Nos. 75-1875 and 75-1919

In the Supreme Court of the United States

OCTOBER TERM, 1976

PACIFIC LEGAL FOUNDATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION IN NO. 75-1919 AND SUGGESTING MOOTNESS IN NO. 75-1875

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. i-xv)[1] is reported at 534 F. 2d 150.

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[1]All "Pet. App." references are to the appendices to the petition in No. 75-1875.

JURISDICTION

The judgments of the court of appeals were entered on March 29, 1976.[2] The petition for a writ of certiorari in No. 75-1875 was filed on June 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The petition for a writ of certiorari in No. 75-1919 was filed out of time. The time for filing a petition for a writ of certiorari was not extended and therefore expired on June 27, 1976. The petition was filed on June 29, 1976. Accordingly, this Court lacks jurisdiction over that case. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 417-418.

STATEMENT

The Clean Air Act, 77 Stat. 392, as amended, 42 U.S.C. (and Supp. V) 1857 *et seq.*, requires the Administrator of the Environmental Protection Agency (EPA) to promulgate national primary and secondary ambient air quality standards that will protect the public from known or anticipated adverse effects of various air pollutants. Each State is primarily responsible for assuring the quality of the air within its territory and must devise an implementation plan designed, at a minimum, to implement, maintain and enforce the national primary and secondary ambient air quality standards.

Under Section 110(a)(2) of the Act, 42 U.S.C. 1857c-5(a)(2), the Administrator is required to approve a state implementation plan if he determines, *inter alia*, that "it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and

[2]A copy of the judgments of the court of appeals are attached hereto as Exhibit B.

maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls * * *" (Section 110(a)(2)(B), 42 U.S.C. 1857c-5(a)(2)(B)). However, if a State submits a plan that does not provide for the attainment of any national ambient air quality standard, Section 110(c)(1)(B) of the Act, 42 U.S.C. (Supp. V) 1857c-5(c)(1)(B), requires that the Administrator promulgate adquate substitute regulations.

Because the State of California failed to submit those portions of its implementation plan imposing transportation controls to the Environmental Protection Agency by the April 15, 1973 deadline,[3] the Administrator disapproved that aspect of the state plan. 38 Fed. Reg. 16550, 16556, 16564. On October 30, 1973, after public hearings, the Administrator promulgated substitute regulations to control emissions from mobile sources of air pollution in five of the State's air quality control regions. 38 Fed. Reg. 31232 *et seq.*

The Administrator concluded that even if all other reasonable stationary source and mobile source emission reduction measures were imposed, the primary ambient air quality standard for photochemical oxidants would not be satisfied in these five regions by May 31, 1977,

[3]The Clean Air Act required each State to submit an implementation plan to EPA by January 30, 1972; the Administrator was required to approve or disapprove a state plan within four months of its submission. 42 U.S.C. 1857c-5(a)(2). The Administrator later granted any State which was required to impose transportation and land-use controls until February 15, 1973, to submit those portions of its plan. 36 Fed. Reg. 15486; 37 Fed. Reg. 10844. In *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 968, 970 (C.A.D.C.), the court held that the Act did not authorize this extension and gave the States until April 15, 1973, to submit the deferred portions of their plans.

the latest date to which he was authorized to extend California's attainment deadline under Section 110(e) of the Act, 42 U.S.C. 1857c-5(e). 38 Fed. Reg. 31233, 31235-31236. Photochemical emissions are largely attributable to automobiles. 38 Fed. Reg. 7323. The Administrator determined that the only measure by which the ambient air quality standards might be satisfied by the mandatory compliance date was by reducing the supply of gasoline, and thus the number of automobile miles traveled in the affected regions. He therefore promulgated a Gasoline Limitation Regulation which provides that no later than May 31, 1977, he may "implement a program * * * limiting the total gallonage of gasoline delivered to retail outlets in [the regions] to that amount which, when combusted, will not result in the ambie. air quality standards being exceeded." 40 C.F.R. 52.241, 38 Fed. Reg. 31245.[4] According to current EPA estimates, even assuming that non-automobile hydrocarbon emissions are reduced by 50 percent by 1977, severe gasoline rationing still would be required in four of these five air quality control regions in order to satisfy the ambient air quality standard for photochemical oxidants (Pet. App. C, p. xxxv)

The State of California, various local government bodies, and petitioner in No. 75-1875 filed timely petitions to review the Gasoline Limitation Regulation in the United States Court of Appeals for the Ninth Circuit. None of the parties attacked the Administrator's authority to limit gasoline sales in the exercise of his statutory responsibility to insure that state implementation plans include emissions limitations and transportation controls necessary to achieve the primary ambient air quality standards.

[4]The gasoline sales limitation regulation applies to the Metropolitan Los Angeles, San Francisco Bay Area, Sacramento Valley, San Joaquin Valley, and San Diego Intrastate Air Quality Control Regions.

Indeed, they conceded "that some form of rationing may ultimately be required * * * if the air quality standards are to be met" (Pet. App. A, p. x). Rather, they argued that the Administrator could not impose a regulation having as great a social and economic impact as the Gasoline Limitation Regulation, even if there were no alternative method for complying with the ambient air quality standards.

The court of appeals found that imposition of a limitation on gasoline sales in the affected areas was the only conceivable means for attaining the national photochemical oxidant air quality standard (Pet. App. A, pp. ix-xii). It therefore held that the Administrator's promulgation of this regulation had been neither arbitrary nor capricious (Pet. App. A, p. xii). It also rejected petitioner's constitutional objection based solely on the magnitude of the effect of this exercise of the federal government's plenary power under the Commerce Clause (Pet. App. A, p. xiii):

> The authority of Congress to regulate air pollution under the Clean Air Act pursuant to the commerce clause has previously been upheld in this case. * * *
>
> The authority to regulate pollution carries with it the power to do so in a manner reasonably calculated to reach that end. Since petitioners do not deny that gasoline reduction is rationally related to its stated purpose, they cannot argue that it is beyond the administrator's authority.

ARGUMENT

On October 12, 1976, John Quarles, Acting Administrator of the EPA, signed a "Revocation of Gasoline Rationing Regulations" (Appendix A, *infra*). That document, which became effective upon publication in the Federal Register (41 Fed. Reg. 45565, October 15, 1976), re-

vokes in its entirety 40 C.F.R. 52.241, the regulation at issue in this case. Consequently, the Gasoline Limitation Regulation no longer exists, and the action is moot. See, *e.g.*, *North Carolina* v. *Rice*, 404 U.S. 244; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 416.

CONCLUSION

The petition for a writ of certiorari in No. 75-1875 should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court to dismiss the petition for review as moot. The petition for a writ of certiorari in No. 75-1919 should be denied because it is untimely.

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OCTOBER 1976.

DOJ-1976-10

APPENDIX A

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Revocation of Gasoline Rationing Regulations

Under the Clean Air Act as amended in 1970, State Implementation Plans (SIP's) were required to contain all regulations necessary to attain the health-related national ambient air quality standards (NAAQS) no later than mid-1977. To the extent that State-developed SIP regulations are inadequate to insure such NAAQS attainment, the Act requires EPA to promulgate the necessary SIP regulations.

In 1973, EPA was required by Court orders to promulgate SIP regulations providing for timely attainment of the NAAQS for carbon monoxide and photochemical oxidants in certain areas of the United States. In response to these orders, EPA added to some SIP's a gasoline rationing regulation to take effect in 1977. This type of regulation was imposed only in those areas where EPA found that all reasonably available measures would not be adequate to attain the NAAQS by mid-1977.

At the time EPA promulgated the gasoline rationing regulations and several times since then, EPA has publicly stated that such regulations would produce extremely adverse social and economic consequences if implemented. Since EPA has had no desire to implement the regulations, EPA has since 1973 proposed and endorsed amendments to the Clean Air Act which would

authorize their revocation. Over the last several months, new Clean Air Act amendments which would have authorized such a revocation passed both Houses of Congress (H.R. 10498 and S. 3219). Such authorization was retained in the compromise amendments approved by the House and Senate Conferees. On October 1, however, Congress adjourned without completing action on the new Clean Air Act amendments.

Since it appears quite unlikely that Congress will enact new legislation before implementation of the gasoline rationing regulations is scheduled to begin (certain reports are to be filed by March 1977 and full implementation is to occur in May 1977), and since EPA has no intention of implementing the regulations, I believe that EPA should revoke them now.

I realize that this revocation will render the affected SIP's defective as a legal matter, since such SIP's will no longer contain regulations which provide for NAAQS attainment. I am convinced, however, that whatever benefits may be gained from keeping a technically legal SIP on the books by retaining the gasoline rationing regulations are outweighed by the seriously disruptive social and economic consequences of such regulations.

This revocation should not be construed as indicating that EPA will accept SIP's which do not insure attainment of the health-related NAAQS on grounds of cost. In fact, EPA is currently in the process of notifying many States that their presently-inadequate SIP's must soon be revised to include all achievable measures necessary to attain the NAAQS as expeditiously as practicable. Onerous, expensive, and/or "technology-forcing" requirements must be imposed wherever necessary. EPA's action today is thus a special case; it is being taken only because of the extraordinarily disruptive

nature of the gasoline rationing regulations and because both Houses of Congress have affirmatively expressed their desire that such regulations not be implemented.

This revocation is effective [date of Federal Register publication]. (Sections 110 and 301 of the Clean Air Act, as amended, 42 U.S.C. 1857c-5, 1857g.)

/s/John Quarles

Acting Administrator

Dated: October 12, 1976

Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart F - California

§52.241 [Revoked]

1. Section 52.241 is revoked.

Subpart G - Colorado

§52.330 [Revoked]

2. Section 52.330 is revoked.

Subpart V - Maryland

§52.1110 [Revoked]

3. Section 52.1110 is revoked.

Subpart FF - New Jersey

§52.1592 [Revoked]

4. Section 52.1592 is revoked.

Subpart SS - Texas

§52.2293 [Revoked]

5. Section 52.2293 is revoked.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 73-3262

CITY OF SANTA ROSA, CITY OF PETALUMA, MUNICIPAL CORPORATIONS AND CHARTER CITIES, CITY OF CLOVERDALE, CITY OF HEALDSBURG, CITY OF SEBASTOPOL AND CITY OF SONOMA, MUNICIPAL CORPORATIONS, PETITIONERS,

v.

RUSSELL E. TRAIN, ADMINISTRATOR AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS.

JUDGMENT

Upon Petition to Review an order of the Environmental Protection Agency .....

.....

This Cause came on to be heard on the Transcript of the Record from the Environmental Protection Agency

.....

..... and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Petition to Review the decision of the said Environmental Protection Agency in this Cause be and hereby is denied.

Filed and entered: March 29, 1976

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3306

RONALD REAGAN, GOVERNOR OF THE STATE OF CALIFORNIA; AND THE CALIFORNIA DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

JUDGMENT

Upon Petition to Review an order of the Environmental Protection Agency .....

.....

This Cause came on to be heard on the Transcript of the Record from the Environmental Protection Agency

.....

.....

..... and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Petition to Review the decision of the said Environmental Protection Agency in this Cause be and hereby is denied.

Filed and entered: March 29, 1976

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3343

PACIFIC LEGAL FOUNDATION, A CALIFORNIA CORPORATION, PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUDGMENT

Upon Petition to Review an order of the Environmental Protection Agency .....

This Cause came on to be heard on the Transcript of the Record from the Environmental Protection Agency

.....

.....

.....and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Petition to Review the decision of the Said Environmental Protection Agency in this Cause be, and hereby is denied.

Filed and entered: March 29, 1976